

E-Filed 11/14/2006

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SYNOPSIS, LLC,

Plaintiff,

v.

EVERGREEN DATA SYSTEMS, INC., et al.,

Defendants.

Case Number C 05-01524 JF (RS)

ORDER¹ GRANTING MOTION FOR
ATTORNEYS' FEES

[re: docket no. 171]

Defendant Ireland San Filippo, LLP ("ISF"), moves for attorneys' fees of \$114,620.50. Synopsis, LLC ("Synopsis"), opposes the motion. For the reasons discussed below, the Court will grant the motion and award attorneys' fees of \$100,000.00 to ISF.

I. BACKGROUND

On January 10, 2005, Synopsis filed the original complaint ("Original Complaint")² in the instant action against Defendants Evergreen Data Systems, Inc. ("Evergreen"), Bruce R.

¹ This disposition is not designated for publication and may not be cited.

² ISF requests judicial notice of the Original Complaint, filed on January 10, 2005, in the Central District of California. The Court will grant this request.

1 McAllister (“McAllister”), Steven J. DeMartini (“DeMartini”), ISF, and Does 1 through 10. On
2 July 13, 2005, this Court issued an order granting the motion of Defendants Evergreen,
3 McAllister, and DeMartini to dismiss Synapsis’s first five claims with leave to amend. The
4 dismissed claims alleged: (1) violation of the Racketeer Influenced and Corrupt Organizations
5 Act (“RICO”), (2) breach of contract, (3) intentional interference with prospective economic
6 advantage, (4) negligent interference with prospective economic advantage, and (5) fraud.

7 On August 10, 2005, Synapsis filed a First Amended Complaint, alleging: (1) violations
8 of RICO, (2) breach of contract, (3) intentional interference with prospective economic
9 advantage, (4) negligent interference with prospective economic advantage, (5) fraud, and (6)
10 trade libel and slander. Defendants Evergreen, McAllister, and DeMartini moved to dismiss the
11 first, third, fourth, and fifth claims, pursuant to Federal Rule of Civil Procedure 12(b)(6).
12 Defendant ISF moved to dismiss the second claim, the only claim alleged against it, pursuant to
13 Federal Rule of Civil Procedure 12(b)(6). On January 9, 2006, this Court issued an order
14 granting ISF’s motion to dismiss with leave to amend (“January 9th Order”). This order also
15 denied in part and granted in part, without leave to amend, the motion to dismiss of Defendants
16 Evergreen, McAllister, and DeMartini.

17 On January 30, 2006, Defendants Evergreen, McAllister, and DeMartini filed an answer
18 and counterclaim against Synapsis and William Akel, the President of Synapsis. On March 8,
19 2006, Synapsis filed a Second Amended Complaint (“SAC”) alleging (1) breach of two
20 contracts: the Sales Agent Agreement (“SAA”) and the Mutual Non-Disclosure Agreement
21 (“NDA”), (2) fraud, (3) trade libel and slander, and (4) conversion. On March 28, 2006,
22 Defendants Evergreen, McAllister, and DeMartini filed an answer to the SAC. ISF filed its
23 answer to the SAC on April 7, 2006. On May 18, 2006, ISF filed a motion for summary
24 judgment or, in the alternative, for summary adjudication of issues. This motion addressed the
25 breach of contract claim, the sole claim asserted against ISF in the SAC. On May 30, 2006,
26 Synapsis opposed the motion for summary judgment, and ISF replied. On June 20, 2006,
27 pursuant to Federal Rule of Civil Procedure 56(f), this Court continued the hearing on ISF’s
28 motion for summary judgment to allow further discovery by Synapsis. ISF filed an amended

1 motion for summary judgment or, in the alternative, for summary adjudication of issues on
 2 August 4, 2006. Synopsis opposed the second motion and ISF replied. The Court heard oral
 3 argument on September 8, 2006. The Court granted the amended motion for summary judgment
 4 on September 12, 2006 ("September 12th Order"), concluding that ISF was not liable for breach
 5 of contract on either an alter-ego or an agency theory.

6 ISF moved for attorneys' fees on September 26, 2006. Synopsis opposed the motion and
 7 ISF replied. The clerk of the court taxed costs of \$452.90 against Synopsis on September 27,
 8 2006. The Court heard oral argument on November 9, 2006.

9 II. LEGAL STANDARD

10 The Ninth Circuit has held that state law controls the determination of the right to
 11 attorneys' fees and the method for calculating attorneys' fees in cases involving diversity or
 12 pendent jurisdiction. *Mangold v. California Public Utilities Commission*, 67 F.3d 1470, 1478
 13 (9th Cir. 1995) (noting that "[e]xisting Ninth Circuit precedent has applied state law in
 14 determining not only the right to fees, but also in the method of calculating fees;" also explaining
 15 that "[t]he *Erie* principles [governing choice of law regarding attorneys' fees] apply equally in
 16 the context of pendent jurisdiction [as diversity jurisdiction]."); *see also Diamond v. John Martin*
 17 *Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985) ("The rule in this circuit requires that federal courts in
 18 diversity actions apply state law with regard to the allowance (or disallowance) of attorneys'
 19 fees."). The Court has pendent jurisdiction over the breach of contract claim, so California law
 20 applies to the determination of the availability and amount of attorneys' fees.³

21 Cal. Civ. Code § 1717(a) provides:

22 In any action on a contract, where the contract specifically provides that attorney's
 23 fees and costs, which are incurred to enforce that contract, shall be awarded either
 24 to one of the parties or to the prevailing party, then the party who is determined to
 25 be the party prevailing on the contract, whether he or she is the party specified in
 26 the contract or not, shall be entitled to reasonable attorney's fees in addition to
 27 other costs.

28 ³ The attorneys' fees provision in the NDA also provides that California law applies.
 NDA § 5(d), SAC Ex. 3.

1 The California Supreme Court has explained that “[w]hen a party obtains a simple, unqualified
 2 victory by completely prevailing on or defeating all contract claims in the action and the contract
 3 contains a provision for attorney fees, section 1717 entitles the successful party to recover
 4 reasonable attorney fees incurred in prosecution or defense of those claims.” *Scott Co. v. Blount,*
 5 *Inc.*, 86 Cal.Rptr.2d 614, 618 (1999). “If neither party achieves a complete victory on all the
 6 contract claims, it is within the discretion of the trial court to determine which party prevailed on
 7 the contract or whether, on balance, neither party prevailed sufficiently to justify an award of
 8 attorney fees.” *Id.* Section 1717 also applies to non-signatories who defend a breach of contract
 9 claim and are found not to be parties to it. *Reynolds Metal Co. v. Alperson*, 158 Cal.Rptr. 1, 3
 10 (1979).

11 The Ninth Circuit summarized California law governing the reasonableness of attorneys’
 12 fees in *Hancock Laboratories, Inc. v. Admiral Ins. Co.*, 777 F.2d 520, 526 n.12 (9th Cir. 1985).
 13 It explained that “[t]he determination of what constitutes reasonable attorneys’ fees is committed
 14 to the sound discretion of the trial court.” *Id.* The court’s opinion described the major factors
 15 considered by California courts as “the nature of the litigation, its difficulty, the amount
 16 involved, the skill required and the skill employed in handling the litigation, the attention given,
 17 the success of the attorney’s efforts, the attorney’s learning, age and experience in the particular
 18 type of work demanded; the intricacies and importance of the litigation, the labor and the
 19 necessity for skilled legal training and ability in trying the cause, and the time consumed.” *Id.*
 20 The court also observed that “[t]he trier of fact in California may determine what is a reasonable
 21 amount to be allowed as attorneys’ fees without hearing any testimony and without making any
 22 specific findings. Judges may rely on their own knowledge and experience to know reasonable
 23 attorneys’ fees.” *Id.* (citation omitted).

24 III. DISCUSSION

25 1. The Timeliness of ISF’s Request for Attorneys’ Fees

26 Synopsis argues that the Court should deny the motion for attorneys’ fees on the ground
 27 that it is premature because the Court has not issued a separate judgment but rather only has
 28 issued an order granting summary judgment to ISF. However, Synopsis has not provided the

1 Court with any authority prohibiting it from considering a motion for attorneys' fees concurrently
 2 with a motion for entry of judgment. ISF requests that the Court deny the motion without
 3 prejudice if it finds the motion premature. However, the Court sees no advantage in deferring its
 4 decision on this fully-briefed motion. Instead, the Court will issue the judgment in this case
 5 simultaneously with this order. The Court concludes that Synapsis will suffer no prejudice from
 6 the Court proceeding in this fashion.

7 2. The Availability of Attorneys' Fees

8 ISF argues that it may recover attorneys' fees from Synapsis under Cal. Civ. Code § 1717
 9 because it prevailed on summary judgment against Synapsis and because the NDA, one of the
 10 two contracts in dispute, contained an attorneys' fees provision.

11 Synapsis alleged in the SAC that ISF breached both the SAA and the NDA. SAC ¶¶ 60-
 12 63, 66; *see also* Original Complaint ¶¶ 30-33. Synapsis alleged breach of the NDA as follows:
 13 "Defendants have breached the confidentiality provisions of [the NDA] by unlawfully
 14 appropriating SYNAPSIS' Work, trade secrets, and proprietary and confidential information to
 15 compete against SYNAPSIS through the internal technical center operated by Defendant
 16 EVERGREEN and MCALLISTER and DEMARTINI." SAC ¶ 63; *see also* Original Complaint
 17 ¶ 33. The NDA includes the following attorneys' fees provision:

18 If either Disclosing Party or Recipient employs attorneys to enforce any rights
 19 arising out of or relating to this Agreement, the prevailing party shall be entitled to
 20 recover reasonable attorney's fees. This Agreement shall be construed and
 controlled by the laws of the State of California, and Recipient further consents to
 jurisdiction by the state and federal courts sitting in [sic] State of California.

21 NDA § 5(d), SAC Ex. 3. The previously-quoted allegation contained in paragraph 63 of the SAC
 22 attempts to enforce a perceived right "arising out of or relating to" the NDA. Synapsis did not
 23 prevail on its breach of contract claim based on its assertions of ISF's alter-ego liability or
 24 ostensible authority over Evergreen. Instead, ISF won summary judgment on the only claim
 25 against it and is a "prevailing party" within the definition of Cal. Civ. Code § 1717. Because it is
 26 a non-signatory that successfully defended a breach of contract claim for which it would have
 27 been liable for attorneys' fees if unsuccessful, ISF may collect attorneys' fees under Cal. Civ.
 28

1 Code § 1717. *Reynolds Metal Co.*, 158 Cal.Rptr. at 3.⁴

2 3. Sufficiency of Motion and Supporting Materials

3 Synopsis next argues that ISF has failed to provide adequate documentation of its
 4 attorneys' fees to allow for an award. Civil Local Rule 54-6(b) describes the required form of a
 5 motion for attorneys' fees. It requires a statement that counsel have met and conferred; a
 6 statement of the services rendered and time spent by each person, with a description of the
 7 manner in which records were maintained; and a description of the qualifications and customary
 8 hourly charges of each person who provided the services. ISF has met the requirements of Civil
 9 Local Rule 54-6(b). The Declaration of Manuel A. Martinez ("Martinez Declaration") submitted
 10 by ISF provides all the required statements and sufficient detail for the Court to determine
 11 reasonable attorneys' fees in this matter. ISF offers to provide the actual time records for
 12 inspection, Reply 5, but the Court concludes that this is not necessary.

13 Synopsis notes that in the Ninth Circuit, "[t]he party petitioning for attorneys' fees bears
 14 the burden of submitting detailed time records justifying the hours claimed to have been
 15 expended." *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291,
 16 1306 (9th Cir. 1994) (internal quotation marks and citations omitted). Synopsis argues that,

18 ⁴ Synopsis argues that the instant action is comparable to *Gil v. Masano*, 121 Cal.App.4th
 19 739 (2004), where the court declined to award attorneys' fees. However, *Gil* involved one of the
 20 parties to the contract bringing suit for fraud, a tort. *Id.* at 742. The court concluded that the
 21 attorneys' fees provision in the contract did not encompass fraud claims, as it pertained to actions
 22 "brought to enforce the terms" of the release the two parties had signed. *Id.* The court noted that
 23 "[w]here a contract authorizes an award of attorney fees in an action to enforce any provision of
 24 the contract, tort claims are not covered." *Id.* at 743. The court reasoned that a broader provision
 25 than that in the contested release might allow some recovery of attorneys' fees in tort actions, but
 26 that the contested release was too narrow to do so. *Id.* at 744. The court concluded that the
 27 defendant could "not recover attorney fees as the prevailing party in the fraud action." *Id.* at 745.

28 The instant case is distinguishable from *Gil* because Synopsis brought suit against ISF for
 breach of contract, not for any tort. *Gil* therefore provides no support for Synopsis' argument
 that ISF may not recover attorneys' fees in this action. Synopsis' attempt to analogize the instant
 case to *Gil* by arguing that the action "did NOT focus on the Non-Disclosure Agreement,"
 Opposition 8, is misplaced. Synopsis' vague reference to "actions arising from any business
 relationship" ignores the fact that the each complaint filed by Synopsis specifically asserts claims
 for breach of the SAA and the NDA. The fact that Synopsis lost on those claims does not erase
 them from their complaints.

pursuant to circuit authority,⁵ ISF is required to provide a fuller itemization of the date, hours, and nature of the work performed than that currently submitted to the Court. However, no reported case specifies the required level of itemization of attorney hours; having reviewed dozens of fee applications, this Court is satisfied that the instant application meets professional standards.

4. Challenges to the Amount of Attorneys' Fees Sought by ISF

a. Apportionment

Synopsis argues that the Court should apportion any award of attorneys' fees, claiming that no more than ten percent of the time and effort expended by counsel for ISF should be apportioned to the NDA, as the parties spent the vast majority of their time litigating the SAA. The California Supreme Court has held that "[w]here a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under section 1717 only as they relate to the contract action." *Reynolds Metal Co. v. Alperson*, 25 Cal.3d 124, 129 (1979). The *Reynolds* court also held, however, that "plaintiff's joinder of causes of action should not dilute its right to attorney's fees. Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." *Id.* at 129-30.

Synopsis asserts that *Reynolds* does not prohibit courts from apportioning attorneys' fees in such situations, but instead only gives courts discretion not to apportion attorneys' fees in such situations. However, even assuming that Synopsis reads *Reynolds* correctly, the Court will exercise its discretion not to apportion attorneys' fees in this case. The Court concludes that ISF's defenses against the claim for the breach of the NDA and the SAA shared common issues of fact and law. The Court also concludes that ISF's defenses with respect to the two contracts

⁵ See also, *Miller v. Woodharbor Molding & Millworks, Inc.*, 174 F.3d 948, 949 (8th Cir. 1999) (upholding the district court's finding of the inadequacy of the documentation of attorneys' fees where the moving party "failed to consistently identify the subject matter of the work performed and repeatedly failed to specify the substance or content of billed tasks") (quotation marks omitted).

1 were “inextricably intertwined, making it impracticable, if not impossible, to separate the
2 multitude of conjoined activities into compensable or noncompensable time units.” *Abdallah v.*
3 *United Savings Bank*, 51 Cal.Rptr.2d 286, 293 (Cal. Ct. App. 1996).⁶

4 ISF defended the claims for breach of the SAA and the NDA on the same basis of the
5 absence of alter-ego authority or an agency relationship. The distinction between the NDA and
6 the SAA on the basis of a difference in signatory parties has no bearing on this analysis, because
7 Synapsis attempted to hold ISF, which of course was not a signatory to either contract, liable for
8 breach of *both* contracts on the basis of the same agency and alter-ego theories. The issues of
9 fact and law were almost identical. Synapsis did not allege that different facts gave rise to
10 ostensible agency or alter-ego liability with regard to the NDA and the SAA. The dispute about
11 liability for breach of both the NDA and the SAA on an ostensible agency theory revolved
12 around alleged representations made by DeMartini and McAllister that ISF owned Evergreen.
13 *See* September 12th Order 9-11. Accordingly, the Court considered the allegations of such
14 representations as they related to the claimed breaches of both contracts. For example, while
15 evidence of an alleged assertion that ISF would “rectify the business situation,” *see id.* at 10,
16 appears to pertain mostly to the SAA, the Court dismissed the first amended complaint in part
17 because “Synapsis [did] not clearly allege having relied on any representations when it entered
18 into the mutual non-disclosure agreement, the only agreement that was entered into after
19 McAllister and DeMartini purchased Evergreen.” January 9th Order 8. The Court ultimately
20 rejected Synapsis’ ostensible agency argument on the ground that Synapsis had not alleged any
21 binding act that any agent had undertaken - a failure common to the SAA and the NDA.
22 September 12th Order 10-11. Similarly, the dispute about alter-ego liability turned on the
23 insufficiency of Synapsis’ allegation of an inequitable result, not any facts specific to the NDA or
24 the SAA. *See* September 12th Order 6; January 9th Order 9.

25
26 ⁶ Synapsis cites *Webb v. Dyer County Bd. of Ed.*, 471 U.S. 234 (1985). *Webb* interprets
27 attorneys’ fees under The Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988,
28 not Cal. Civ. Code §1717. It’s discussion of apportionment between administrative hearings and
an ensuing civil action also has little bearing on this case. Accordingly, *Webb* does not support
Synapsis’ argument.

1 Thus, the separate identities, contents, and origins of the NDA and the SAA had little or
 2 no bearing on the Court's resolution of this litigation between ISF and Synapsis. Common issues
 3 of law and fact dominated ISF's defense against Synapsis' attempts to hold ISF liable for asserted
 4 breaches of the NDA and the SAA. Simply put, summary judgment was granted because
 5 Synapsis failed to plead or provide sufficient evidence to support required elements of agency or
 6 alter-ego theories, not because of any distinction between the NDA and the SAA. Under these
 7 circumstances, apportionment would be inappropriate.

8 b. Disputed Amount of Fees

9 Synapsis argues that the amount of attorneys' fees sought by ISF is unreasonable on the
 10 grounds that the attorney rates are too high, that ISF's counsel billed too many hours, and that
 11 ISF should not seek reimbursement for paralegal fees.

12 i. Attorneys' Fees

13 (1) Rates

14 Synapsis argues that ISF should recover attorneys' fees at the rate that it compensates its
 15 own counsel (\$300/hr), rather than at the rate that ISF compensates its counsel (\$395/hr).
 16 Synapsis provides no authority and little argument justifying such a reduction in attorneys' fees.
 17 The Court concludes that the rates charged by the various attorneys who contributed to ISF's
 18 defense of this matter are reasonable given market rates.⁷

19 (2) Hours

20 Synapsis argues that ISF should not recover \$68,255.75 of the attorneys' fees that it seeks
 21 on the grounds that the tasks which counsel for ISF undertook did not require the amount of time
 22 that counsel for ISF dedicated to them. Opposition 14. The Court is familiar with the
 23 complexities and motion practice in this case. It has reviewed the materials submitted by ISF and
 24 concludes that the amount of time that counsel for ISF spent throughout the litigation is
 25 reasonable. The Court will not reduce the award of attorneys' fees on the basis that counsel for
 26 ISF took too long to perform any individual task in this litigation.

27
 28 ⁷ ISF provides the rates and hours charged by individual attorneys who worked on ISF's
 defense of this action in the Martinez Declaration ¶¶ 17-22.

1 ii. Paralegal Fees

2 Synopsis argues that ISF may not recover fees for services provided by paralegals.
 3 Opposition 8 n.3. Synopsis provides no authority for such an assertion. The California Supreme
 4 Court has not spoken on the specific issue of whether an attorneys' fees provision may include
 5 paralegal fees under Cal. Civ. Code §1717. However, the California Courts of Appeal have
 6 decided that recovery of attorneys' fees generally allows recovery of associated paralegal fees.
 7 *See e.g. Guinn v. Dotson*, 23 Cal.App.4th 262, 268-70 (1994) (describing the trend of allowing
 8 paralegal fees across a number of different statutes and in contractual provisions providing for
 9 attorneys' fees). The Court finds the reasoning behind this trend persuasive. Excluding paralegal
 10 fees from an award of attorneys' fees would incentivize lawyers to perform the functions of
 11 paralegals. The Court concludes that it should avoid such an outcome. Accordingly, the Court
 12 concludes that the inclusion of paralegal fees in ISF's request for attorneys' fees is reasonable.⁸

13 5. Reasonable Fees Under the Circumstances of this Litigation

14 The determination of reasonable attorneys' fees rests within the discretion of the Court.
 15 *Hancock Laboratories*, 777 F.2d at 526 n.12.⁹ On the basis of the evidence presented by ISF, the
 16 Court concludes that many of the major factors discussed in *Hancock Laboratories* weigh in
 17 favor of granting ISF the attorneys' fees that it seeks. This litigation is complex, exposed ISF to
 18 potential damages of over \$1,000,000, *see* SAC ¶ 67, and required a high level of skill from
 19 counsel for ISF. Counsel for ISF provided the necessary expertise and effort and consequently
 20 won a motion for summary judgment; although not before having to engage in other motion

21
 22 ⁸ The Court notes a discrepancy in the Declaration of Martinez Declaration regarding the
 23 prevailing rate for billing paralegal time. In discussing Brian Higgins' hourly rate, Martinez
 24 describes \$110/hr as "the normal rate charged and collected by Stein & Lubin for time billed by
 25 paralegals." Martinez Declaration ¶ 24. In the next paragraph, Martinez makes the same
 26 assertion about Christiana Hoffman's rate of \$130/hr. *Id.* ¶ 25. Both these statements cannot be
 accurate. Assuming that \$110/hr represents the correct hourly rate for paralegals, the fees billed
 for Ms. Hoffman are \$6.00 too high (0.3 hrs billed (Martinez Declaration ¶ 17) * \$20/hr
 reduction in price).

27 ⁹ Synopsis provides the Court with no authority indicating that California law on
 28 attorneys' fees has changed since the *Hancock* decision in such a way as to command a different
 result. The Court concludes that it has not.

1 practice. The attorneys who provided legal services to ISF have extensive qualifications and
 2 charged rates commensurate with their experience.

3 Moreover, counsel for ISF have produced evidence indicating that they took proactive
 4 steps to reduce the legal fees that they generated while representing ISF. They have provided the
 5 Court with copies of letters they sent to counsel for Synapsis indicating that ISF would enter into
 6 a tolling agreement if Synapsis agreed to dismiss it from the litigation without prejudice.
 7 Martinez Declaration Exs. A-B. Counsel for ISF have also declared that they consciously
 8 avoided undertaking unnecessary discovery and instead focused on motion practice, even though
 9 their calculated risk may have increased the possibility that ISF would be held liable. Martinez
 10 Declaration ¶ 27.

11 However, the Court is troubled by the proportion of time spent on the case by Mr.
 12 Martinez as opposed to lower-billing associates. Martinez, a partner at Stein & Lubin who
 13 charges \$395/hr, spent 189.90 hours working on the case, while the three associates who
 14 contributed to the work on the case spent a combined 139.70 hours at rates ranging from \$235-
 15 \$250. For the purposes of Cal. Civ. Code § 1717 and the relevant clause in the NDA,
 16 “reasonable attorneys’ fees” do not include such a heavy concentration of Mr. Martinez’s time.
 17 The Court concludes that Mr. Martinez’s associates could have handled a larger portion of this
 18 litigation. Accordingly, the Court will adjust the award of attorneys’ fees. The Court concludes
 19 that an award of \$100,000.00 reflects reasonable attorneys’ fees in this matter on the basis that
 20 such an award reflects a reasonable proportion of associate and partner time given the complexity
 21 of the litigation, the motion practice, and standards in the local legal community.

22 IV. ORDER

23 Good cause therefor appearing, IT IS HEREBY ORDERED that ISF’s motion for
 24 attorneys’ fees is GRANTED. Synapsis shall pay ISF \$100,000.00 in attorneys’ fees.

25
 26 DATED: November 14, 2006.

27
 28 
 JEREMY FOGEL
 United States District Judge

1 This Order has been served upon the following persons:

2 William Shibly Akel wmakel@counterstrike.com

3 Daniel C. DeCarlo decarlo@lbbslaw.com, kkim@lbbslaw.com;
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9 Notice will be delivered by other means to:

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